Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Public Knowledge, et al.	)	WT Docket No. 08-7
	)	
For a Declaratory Ruling that Text Messaging and Short Codes are Title II Services or Are Title I Services Subject to Section 202 Nondiscrimination Rules	)	

COMMENTS OF AT&T INC.

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AT&T Inc. ("AT&T"), on behalf of itself and its affiliates, respectfully submits these comments in opposition to the Petition for Declaratory Ruling of Twilio Inc. filed on August 28, 2015 in WT Docket No. 08-7 ("Twilio Petition").[1]

INTRODUCTION AND SUMMARY

Twilio's request for a "declaration" that wireless text messaging services should be subjected to the most intrusive forms of Title II regulation is patently unlawful, directly contrary to the Communications Act's core intent to allow information services to develop free from the impediments of common carrier regulation and, if adopted, would affirmatively harm wireless

[1] *See* Public Notice, *Wireless Telecommunications Bureau Seeks Comment Regarding Petition Seeking A Declaratory Ruling Clarifying The Regulatory Status of Mobile Messaging Services*, WT Docket No. 08-7, DA 15-1169 (Wireless Telecomm. Bur. rel. Oct. 13, 2015) ("*Public Notice*"). In addition to seeking comment on the Twilio Petition, the Bureau stated in the *Public Notice* that it seeks to "refresh the record in this proceeding in light of marketplace and legal developments" since it considered a similar petition in 2008. *See* Petition of Public Knowledge et al. for Declaratory Ruling Stating Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, filed Dec. 11, 2007 ("Public Knowledge Petition").

consumers. The Commission has recently condemned and taken steps in other contexts to combat the considerable consumer harms caused by unwanted calls and text messages – a scourge that the Commission has deemed an "invasion of consumer privacy and a risk to public safety."[2] Twilio's Petition would invite those very harms, because its request for a declaratory ruling that text messaging is a common carrier service subject to Title II's nondiscrimination provisions[3] is in reality a request to dismantle the existing protections for limiting abusive and deceptive text messaging. If Twilio's petition were granted, the floodgates would be opened to the sorts of harmful text messages that most threaten "vital consumer protection[]" interests.[4] CTIA extensively explains these and other important public policy implications of Twilio's Petition in its Comments. AT&T agrees with CTIA's analysis, and will not repeat it here.

Instead, AT&T focuses on the legal barriers that preclude Twilio's requested declaration that text messaging services are "telecommunications services" subject to Title II regulation. Twilio's Petition is fundamentally flawed because text messaging services are statutorily protected from Title II regulation – both because they are "private mobile radio services" under Section 332 and because they are classic "information services" under Section 3(24) that offer computer-based storage, retrieval, and net protocol conversion capabilities. Twilio's new arguments, which are based principally on the notion that the recent Net Neutrality cases and orders somehow compel a finding of common carriage here, are baseless.

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[2] Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, ¶ 4 (rel. July 10, 2015) ("*2015 TCPA Declaratory Ruling*"); *id.* at ¶ 1 (noting that complaints about such unwanted communications "top the list of consumer complaints received by the Commission").

[3] *See* 47 U.S.C. §§ 201-202.

[4] *2015 TCPA Declaratory Ruling* ¶ 2.

I. TEXT MESSAGING SERVICES ARE NOT TELECOMMUNICATIONS SERVICES SUBJECT TO COMMON CARRIER REGULATION UNDER TITLE II.

Title II of the Communications Act authorizes the Commission to regulate services as common carriage only when the services at issue meet the statutory definitions of carrier services.[5] The statute makes clear, however, and the D.C. Circuit has held, that wireless services that fall *outside* the Act's definition of "commercial mobile services" and *within* the Act's definition of "information services" are "statutorily immune, perhaps twice over, from treatment as common carriers."[6] That is because Section 332(c)(2) prohibits common carrier regulation of private mobile services,[7] and Section 153(51) of the Act prohibits common carrier regulation of information services.[8] Thus, the D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate [such wireless] providers as common carriers."[9] As shown below, text messaging services are mobile wireless services that *are not* "commercial mobile services" and *are* "information services." Therefore, providers of text messages are "statutorily immune" from common carrier regulation.

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[5] *See* 47 U.S.C. § 153(50), defining "telecommunications"; 47 U.S.C. § 153(53), defining "telecommunications service"; Notice of Proposed Rulemaking, *Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd. 20391, ¶ 36 (1998) ("Only those services which are considered to be 'telecommunications services' are subject to regulation under Title II").

[6] *Cellco Partnership* v. *FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

[7] 47 U.S.C. § 332(c)(2) ("[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter"). *See Verizon* v. *FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

[8] 47 U.S.C. § 153(51) ("[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services").

[9] *Verizon*, 740 F.3d at 650 (citing *Cellco*, 700 F.3d at 538).

A. Text Messaging Services Are Not Commercial Mobile Radio Services.

Twilio contends[10] that text messaging services are commercial mobile radio services ("CMRS"), which are subject to common carriage regulation under Title II pursuant to section 332 of the Act.[11] This argument is wrong for numerous reasons.

First, text messaging does not fall within the statutory definition of CMRS, which is "any mobile service . . . that is provided for profit and makes *interconnected* service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[12] The Act defines an "interconnected service" as a "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . . ."[13] Under the Commission's rules, "interconnected service" is defined as a service that is "interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network."[14]

The Commission held in the *Wireless Broadband Ruling* that the critical question is whether the service gives end users the capability "to communicate to or receive communications from all other users on the public switched network."[15] Text messaging does not. Text messages are not transmitted on the public switched telephone network ("PSTN") and

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[10] Twilio Petition at 35-36.

[11] *See* 47 U.S.C. § 332(c)(1)(A).

[12] *Id.* § 332(d)(1) (emphasis added).

[13] *Id.* § 332(d)(2).

[14] 47 C.F.R. § 20.3.

[15] Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901, ¶ 45 (2007) ("*Wireless Broadband Ruling*") (emphasis and internal quotation omitted).

text messaging service only gives subscribers the capability to interact, via messaging, with other SMS-enabled devices. Text messaging therefore does not permit communications with everyone on the public switched network (*i.e.*, a customer cannot use text messaging to reach any landline phone or any wireless phone that is not SMS-enabled).

The *Net Neutrality Order* does not change this analysis, and indeed bolsters it. In that *Order*, the Commission modified its definition of "public switched network" – which is part of the definition of "interconnected service" – to include the Internet, *i.e.*, "to include networks that use standardized addressing identifiers other than NANP numbers for routing of packets" such as "IP addresses."[16] The Commission explained that this change was designed to "reflect[] the current network landscape," but also confirmed that the "quality of ubiquitous access" was the "key distinction underlying the formulation of the CMRS definition by Congress" and thus is still the touchstone for defining CMRS service.[17] Under the Commission's revised definition, text messaging departs to an even greater extent from the definition of an "interconnected service," because it does not provide ubiquitous access to either the PSTN or the Internet (and, indeed, provides very limited access to the latter).

Moreover, contrary to Twilio's assertions,[18] the *Net Neutrality Order* did not address whether text messaging is an interconnected service, and its reasoning does not support that conclusion. Twilio points to a portion of the *Net Neutrality Order* in which the Commission held that mobile broadband Internet access service meets the Commission's definition of an

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[16] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 391 (2015) ("*Net Neutrality Order"*); *see* 47 C.F.R. § 20.3.

[17] *Net Neutrality Order* ¶ 391 (internal quotation omitted); *see also id.* ¶ 398 (finding that mobile broadband is an "interconnected service" because it "gives its users the capability to send and receive communications from *all other users* of the Internet") (emphasis added); *id.* ¶ 399 (same).

[18] Twilio Petition at 35-36.

"interconnected service" because users of that service have the capability "to communicate with NANP numbers."[19] Twilio contends that "[t]his same holding applies with more force here" because "[m]essaging services are designed to communicate with NANP numbers."[20] But Twilio ignores the prong of the definition that requires the service to provide end users with the capability to communicate with all other users on the public switched network. The Commission in the *Net Neutrality Order* found that mobile broadband Internet access service is an "interconnected service" because it "gives subscribers the capability to communicate with all NANP endpoints" (as well as all users of the Internet)[21]; as shown, text messaging does *not* allow users to communicate with everyone on the public switched network.[22] Accordingly, the reasoning of the *Net Neutrality Order* confirms that text messaging is *not* an "interconnected service."

Twilio's reliance on the Commission's 2007 *Data Roaming Order* likewise ignores the plain language of that *Order*.[23] The Commission explicitly stated that "nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS, or other data features/services."[24] Indeed, in that order, the Commission was not considering the question whether text messaging fell within the statutory definition of "commercial mobile service."

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[19] *Id.* (citing *Net Neutrality Order* ¶ 400).

[20] Twilio Petition at 36.

[21] *Net Neutrality Order* ¶ 401.

[22] The snippets that Twilio quotes from CTIA's brief in the appeal of the *Net Neutrality Order* do not establish that the wireless carriers have "already conceded that messaging services are interconnected to the telephone network because such services rely on NANP numbers." Twilio Petition at 36. In any event, as shown, "interconnected" services must provide end users with access to all other users on the PSTN, and text messaging does not provide that capability.

[23] Twilio Petition at 35 (citing Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 55 (2007) ("*Data Roaming Order*")).

[24] *Data Roaming Order* ¶ 54 & n.134.

Rather, the Commission was considering the limited question whether extending the automatic roaming requirement to text messaging in some instances would be in the public interest. It noted that text messaging is "typically" bundled with *other* features that are "interconnected with the public switched network," such as "real-time, two-way switched mobile voice or data."[25] Text messaging itself, the Commission acknowledged, was provisioned differently from carrier to carrier, as an "interconnected feature[] or service[] in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers."[26] But text messaging is not interconnected in a way that would permit a user to communicate with all other users on the public switched network – and therefore, text messaging is not a "commercial mobile radio service" within the meaning of Section 332.

B. Text Messaging Services Are Classic Information Services.

Text messaging is also "statutorily immune" from Title II regulation because it is an information service, and the Communications Act exempts information services provided by common carriers from common carrier regulation.[27] The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[28] Text messaging clearly falls within this definition, both because it offers the capability for "storing" and "retrieving" information, and because it provides "processing" and "transforming" of information through protocol conversions.

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[25] *Id.* ¶ 55.

[26] *Id.* ¶¶ 54-55.

[27] 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .").

[28] 47 U.S.C. § 153(24).

Text messaging is a classic "store-and-forward" service that allows a user to store and retrieve information. When a text message is sent to or from a wireless user, it is not carried over the PSTN, but instead is carried over private data links (and the Internet when the message originates on a computer). AT&T and other carriers route the messages through servers on their data networks. If the recipient of the message does not have his equipment active and ready to receive the message, the message is stored in a carrier's server for later delivery – sometimes days later. Moreover, once the message is delivered, the user can store the message indefinitely in his wireless device, where the user can edit the message, forward it to someone else, or reply by text. In this regard, text messaging is indistinguishable from email, which the Commission has expressly held to be an information service.[29] It is also similar to telemessaging services (including voice mail and voice storage and retrieval services) that the Commission has classified as information services.[30]

Text messaging also allows subscribers to "retrieve" data by accessing electronic databases, such as automatic alerts, sports scores, weather updates, and other similar information. It is well-settled that such "subscriber interaction with stored information" triggers an information service classification.[31]

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[29] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, ¶ 78 (1998) ("*Stevens Report*") ("[E]lectronic mail utilizes data storage as a key feature of the service offering. The fact that an electronic mail message is stored on an Internet service provider's computers in digital form offers the subscriber extensive capabilities for manipulation of the underlying data."); *id.* at ¶ 78 n.161 ("it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time").

[30] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 145 (1996) ("*1996 Non-Accounting Safeguards Order*").

[31] Memorandum Opinion and Order, *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 20 (1987).

Text messaging is an information service for the additional reason that it offers protocol conversion capabilities. Many text messages undergo a protocol conversion. For example, when a text message is sent to a computer, the message is converted from a text message protocol to an email SMTP message in IP format – a net protocol conversion. Similarly when text messages are sent from AT&T customers to other wireless carriers' customers, there may be protocol conversions due to the different formats and protocols in each network. The Commission has held that services involving net protocol conversion are "information services" under the Act, because such conversion involves the "transforming" of information.[32]

Twilio's superficial arguments[33] that text messaging is a telecommunications service because it provides "pure telecommunications" or "basic transmission service" simply ignore the nature and features of text messaging services, as discussed above, and how they are provisioned. And Twilio's suggestion[34] that descriptions of text messaging in the wireless carriers' promotional materials "must lead to the conclusion that what they are offering is a telecommunications service" is frivolous; those non-technical, consumer-facing descriptions do not fully describe the nature of the services or how carriers provide them, and thus have no bearing on how the services should be classified under the statutory definitions.

C. Short Code Provisioning Is Not A Common Carrier Service.

To the extent that Twilio is asserting that the Commission has Title II authority to regulate third-party contractual arrangements concerning short code provisioning, that is incorrect because such provisioning lies completely outside the Communications Act. Short codes are number sequences that serve as addresses for text messages; they are not telephone

[32] *See 1996 Non-Accounting Safeguards Order* ¶¶ 102, 104-05; *Stevens Report* ¶ 88.

[33] *See* Twilio Petition at 31, 34.

[34] *Id.* at 31-33.

numbers. They were primarily developed by commercial entities as a marketing and billing tool for advertisers and other third parties. The marketers and third parties lease the short codes from a registry administered by an independent entity, called Neustar, and then advertise them as an easily-remembered text message address that wireless subscribers can use to participate in various promotions and activities, such as entering contests, voting for contestants on programs, or receiving product information. The wireless carriers sometimes perform a billing and collection function by including on their subscribers' bills the charges associated with the text messages that subscribers send to the third parties via the short codes.

A wireless carrier's provisioning and activation of short codes for a third party involves no offer or supply of a transmission service, and no "transmission" of any messages or information. The wireless carrier therefore does not provide a "telecommunications service" when it provisions the codes, because the Communications Act defines "telecommunications service" as the offering of "telecommunications" to the public, and it defines "telecommunications" as the "transmission" of information. Accordingly, the Commission has no Title II authority to regulate the offering of short codes at all, as it is not a common carrier service.

II. TWILIO'S OTHER ARGUMENTS IN FAVOR OF TITLE II REGULATION ARE MERITLESS.

Twilio contends[35] that the D.C. Circuit's decision in *Verizon* v. *FCC*,[36] "[c]ompels [t]he [r]esult" that messaging services are Title II services because the Commission has already held that messaging services are "calls" subject to some Title II obligations. This argument is flawed in multiple respects.

[35] Twilio Petition at 26-29.

[36] 740 F.3d 623 (D.C. Cir. 2014).

Twilio principally relies upon the fact that the Commission has defined text messages as "calls" that are subject to the Telephone Consumer Protection Act ("TCPA"),[37] which restricts telemarketing and automatic dialing systems and is part of Title II.[38] But it does not follow from the Commission's finding that text messages are "calls" for purposes of the TCPA that they are also "telecommunications" or "telecommunications services" under the Act. The statutory definitions of "telecommunications" and "telecommunications service"[39] do not contain the term "call" or in any way cross-reference the provisions or definitions of the TCPA. Accordingly, the Commission's interpretation of the term "call" for purposes of applying the TCPA has no implications for whether text messages are "telecommunications services" under the Act that are subject to the full array of common carrier regulation. Moreover, had the Commission meant to make a historic determination in its *2003 TCPA Order* to classify text messages as a Title II service – a classification that the Commission had long declined to make – it presumably would have expressly mentioned and discussed that determination in its order, rather than leaving it to the industry to infer that unstated conclusion from its discussion of "calls."[40]

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[37] 47 U.S.C. § 227.

[38] *See* Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 165 (2003) ("*2003 TCPA Order*") (TCPA prohibition "encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls . . ."); *Satterfield* v. *Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (upholding FCC determination that "a text message is a 'call' within the TCPA"); *2015 TCPA Declaratory Ruling* ¶ 3 ("our use of the term 'call' includes text messages").

[39] 47 U.S.C. § 153(50) & (53).

[40] *Cf. Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.")

Twilio also points to a consent decree to show that the Commission already regulates text messaging under Title II,[41] but a consent decree is merely a compromise settlement that does not resolve issues of law and, by its terms, cannot serve as legal precedent.[42]

Twilio also garbles the holding of *Verizon*. Twilio contends that the D.C. Circuit held in *Verizon* "that if a communications service is regulated as a telecommunications service subject to a common carrier obligation in part, it has to be regulated as a Title II common carrier service as a whole."[43] But *Verizon* held no such thing. In that case, Verizon and its supporters argued that when the Communications Act prohibits the regulation of a service as common carriage, it is unlawful for the Commission to treat it as common carriage. The D.C. Circuit agreed, and that was its basis for striking down portions of the Commission's order.[44] Accordingly, *Verizon* does not support, much less "compel," Twilio's position that text messaging should be subject to Title II regulation.

In any event, neither Congress nor the Commission has ever subscribed to the notion that the application of *any* aspect of Title II to a service or entity means that *all* of Title II must apply to that service or entity. For example, Section 255 of the Act[45] – which is part of Title II – imposes obligations concerning disability access on "manufacturer[s] of telecommunications equipment or customer premises equipment," but neither Congress nor the Commission has ever

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[41] Twilio Petition at 28-29.

[42] *See, e.g.*, *Arizona* v. *California*, 530 U.S. 392, 414 (2000) (with a consent decree, "none of the issues is actually litigated" and the decree therefore does not "preclude further litigation on any of the issues presented") (internal quotations omitted).

[43] Twilio Petition at 26 (citing *Verizon*, 740 F.3d at 650-59).

[44] *Verizon*, 740 F.3d at 628 ("Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.").

[45] 47 U.S.C. § 255.

suggested that such manufacturers are common carriers or subject to *all* of Title II's numerous requirements. The mere fact that a specific provision of Title II may use unusual terms like "call" to extend particular requirements to entities that are not otherwise carriers does not imply that such entities suddenly become carriers for all other purposes under Title II; to the contrary, the use of such specific terms tailored to a unique context confirms that such entities are not otherwise carriers.

CONCLUSION

For the foregoing reasons, the Commission should deny the Twilio Petition and the Public Knowledge Petition.

Respectfully submitted,

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